No. 90-1014

In The

Supreme Court of the United States

October Term, 1991

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

I. RESPONDENT'S "NEUTRALITY" TEST IS UNWORKABLE AS A JURIDICAL TOOL, PRODUCING RESULTS UNFAITHFUL TO THE PRINCIPLE EMBODIED IN THE ESTABLISHMENT CLAUSE.

A. Respondent's Construction of the Establishment Clause Requires an Exclusively Secular Civic Life for this Nation.

Respondent argues that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is the "distillation" of a body of precedent teaching judges to use government "neutrality" toward religion as a standard with which to measure the bounds of the Establishment Clause. Resp. Br. at 16-17. This test, according to Respondent, includes the notion that government is not to act so as to communicate a "message of endorsement" of religion. Resp. Br. at 22-23. Since, in Respondent's mind, the reference to God in Rabbi Gutterman's graduation invocation and benediction constitutes such an endorsement, it is unconstitutional. Resp. Br. at 28-30. The rabbi's reference to God was not "neutral" toward God, and thus was an establishment of religion. Respondent's understanding of the Establishment Clause's requirements punctuates the point advanced in our opening brief: If the familiar and venerable tradition of graduation invocations and benedictions violates the Establishment Clause, what civic expression of religious belief does not?

Respondent, obviously aware of the startling sweep of his vision of the Establishment Clause, opens his argument with an attempt at reassurance. This case, Respondent says, is not about "prayer during presidential inaugurations, congressional sessions, and proclamations of National Days of Thanksgiving." Resp. Br. at 11. But nowhere in his brief can Respondent bring himself to say that those cases, no doubt soon to follow if Respondent prevails here, would or could come out differently under his analysis. Surely our national motto – "In God We Trust" – and our Pledge of Allegiance must be forbidden government "endorsements" of religion

under Respondent's view of the "neutrality" required by the Establishment Clause.

Respondent fails to articulate any principled limits on his analysis because his analysis is logically not susceptible to any limit short of its goal: The complete elimination from American civic life of all expressions of religious sentiment. Counsel for one of Respondent's *amici* has explained elsewhere the logic of Respondent's notion of government "neutrality" toward religion:

> [The Supreme Court] should not have held that chaplains can open each meeting of a state legislature with prayer, or that municipalities can erect Christmas displays. These decisions are wholly unprincipled and indefensible. A little bit of government support for religion may be only a little bit of establishment, but it is still an establishment. The government should not put "In God We Trust" on coins; it should not open court sessions with "God save the United States and this honorable Court"; and it should not name a city or a naval vessel for the Body of Christ or the Queen of the Angels.

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 8 (1986).[1]

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[1] Prof. Laycock's conclusions concerning the results of the "neutrality" or "no-endorsement" test are shared by some other commentators. *See, e.g.*, Jones, *"In God We Trust" and the Establishment Clause*, 31 J. of Church & State 381, 382 (1989) ("God-references fail the Supreme Court's Establishment Clause doctrines . . . . "); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 307 (1987) ("*The No-Endorsement Test*") ("Ceremonial uses of prayer, such as the invocation given before a legislative session, or public religious allusions such as the motto on coins confessing "In God We Trust," may communicate support or approval for religious beliefs."); Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 69 N.C. L. Rev. 1049, 1055-58 (1986) ("*Rethinking Government Neutrality*") (concluding that the Pledge

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Some lower courts have embraced this logic of the "neutrality" or "no-endorsement" standard, as can be seen in cases such as those invalidating city seals with religious imagery,[2] as well as in the district court's conclusion below that "God has been ruled out of public education." App. 21a.[3]

The arguments of Respondent and his *amici* underscore how the secularizing principle they espouse, if indeed embraced by the Constitution, would be amplified in modern American society. They take pains to point out that public schools came along decades after the founding generation. Resp. Br. at 37-38; American Jewish Cong. Br. at 25-32. That is true; indeed, modern American government is no doubt far more pervasively involved in the lives of Americans – both individually and as communities – than the Framers ever contemplated. If Respondent's view of "neutrality" is the rule courts are to apply under the Establishment Clause, the innumerable ways the modern state touches our lives means that a

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of Allegiance and the opening of Supreme Court sessions violate the Establishment Clause); Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 Wm. & Mary L. Rev. 943, 947 (1986) ("The placement of 'In God We Trust' on coins and currency . . . seems to have no real purpose other than a religious one. Moreover, the proclamations by almost all our Presidents of national days of Thanksgiving to 'Almighty God' only seem fairly characterized as having a religious purpose."); Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 Conn. L. Rev. 739, 746 n.30 (1986) (urging the elimination of "all references to God in public life").

[2] *See, e.g., Harris v. City of Zion*, 927 F.2d 1401 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3083 (U.S. July 19, 1991) (No. 91-141); *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). *See also Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3654 (U.S. Mar. 15, 1991) (No. 90-1448).

[3] "App." denotes the Appendix to the Petition for a Writ of Certiorari.

sweeping purge of religious expression from broad ranges of our social intercourse must be in order. *See* Pet. Br. at 8-9.[4]

Though Respondent's *amici* claim that their analysis of the Establishment Clause "is a helpful way of explaining that it is not a forbidden benefit to religion to exempt conscientious objectors or otherwise remove burdens from religious practice," American Jewish Cong. Br. at 45, this conclusory statement reveals more their appreciation of the reach of their thinking than some principled way to limit it. As a logical matter, "accommodation" and "endorsement" are not so readily distinguished,[5] and, as a practical matter, commonly spring from the same motivation.[6] This weakness of their "no-endorsement" test as a doctrinal tool is illustrated by criticism from supporters of that test directed at *Lynch v. Donnelly*, 465

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[4] *See also* McConnell, *Book Review*, 6 Const. Commentary 123, 124-25 (1989) (reviewing T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986)) ("As the scope of government expands into areas that formerly were private and often religious (such as education and social welfare), excluding religion from the governmental sphere becomes a powerful engine of secularization.").

[5] *See, e.g., The No-Endorsement Test* at 282 ("Far from being mutually exclusive, 'accommodation' and 'endorsement' of religion are much more likely to coincide. Asking whether a law beneficial to religion is an 'endorsement' or an 'accommodation,' therefore, is no more sensible than asking whether a lemon is yellow or sour; the answer in each case is, 'Both.' "). Under Respondent's analysis, providing a government benefit, such as unemployment compensation, solely on account of an individual's religious practices must be seen as a forbidden government endorsement of religion, suggesting that cases like *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963), must be discarded if Respondent prevails here.

[6] *See, e.g.*, McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 47 ("Legislative history in an accommodation case is quite likely to reveal that the legislators who cared enough to sponsor the legislation were those who approved of the religious practice in question.").

U.S. 668 (1984), upholding a town's sponsorship of a nativity scene in a Christmas display, criticism based on the conclusion that the creche constituted an unconstitutional endorsement of religion.[7]

Trying to circumscribe the broad implications of his position for all manner of public acknowledgments of religious values, Respondent seeks to emphasize the "public school setting" as a "crucial" distinction for reaching what he urges as the proper outcome here. Resp. Br. at 11. Yet Respondent's theory that the Establishment Clause mandates government "neutrality" toward religion surely undermines his notion that the "public school setting" is distinct from other civic ceremonies under the Establishment Clause as he understands it. Neutrality is a goal obviously not dependent on a setting nor made more constitutionally endangered in a local public school, as opposed to the chamber of the national legislature or the supreme judicial body of the land. In short, nothing about the graduation setting logically identifies what Respondent advances as "the essential nature of this case," Resp. Br. at 11, in terms of the very analysis Respondent wishes this Court to adopt. That setting thus cannot serve to cabin the expansive implications of Respondent's interpretation of the Establishment Clause.

Close and candid examination of the "no-endorsement" standard thus brings to mind the observation made by Justice Kennedy, joined by the Chief Justice and Justices White and Scalia:

> Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and

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[7] *See, e.g., Rethinking Government Neutrality* at 1065. In *Lynch*, Justice O'Connor's understanding of "endorsement" did not extend so far as to render Thanksgiving proclamations, the national motto, judicial ceremonies, and the like unconstitutional, *id.* at 692-93 (O'Connor, J., concurring), as would Respondent's theory. Indeed, we submit that under the endorsement analysis articulated by Justice O'Connor, the graduation prayers here do not constitute an Establishment Clause violation. *See* Pet. Br. at 44 nn.42-43.

> stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Strikingly, almost 30 years ago Justice Goldberg warned – while invalidating Bible reading and prayer in public classrooms – that "untutored devotion to the concept of neutrality" could lead to the exact result now sought by Respondent and achieved by the vision of the Establishment Clause he advances;[8] "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).[9] A doctrinal tool that leads lower courts on this drive towards the secular is at war with "the central role religion plays in our society," *Allegheny County*, 492 U.S. at 657

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[8] By their discussion of *Lemon* and the cases that preceded it, Respondent and his *amici* seem to imply that these precedents have produced workable doctrine with which courts can faithfully and consistently apply the Establishment Clause. *See, e.g.*, Resp. Br. at 16-23; American Jewish Cong. Br. at 32-48; Council on Religious Freedom Br. at 4-12. In so doing, Respondent and his *amici* have simply ignored the substantial criticism directed at *Lemon* and related cases by members of this Court and by respected scholars. *See* Pet. Br. at 12 and nn.10-11. "Although the *Lemon* test has survived for over a decade and a half, few have found the formulation satisfactory." *The No-Endorsement Test* at 269.

[9] Exclusively secular criteria for all spheres of government activity produce results far from "neutral." *See, e.g.*, McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U.L. Rev. 146, 162 (1986) ("If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least that the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not 'neutral.' Studious silence on a subject that parents may say touches all of life is an eloquent refutation.").

(Kennedy, J., concurring in the judgment in part and dissenting in part), and with the rule of law established by the Framers of the First Amendment.

B. The Framers' Disestablishment Decision Sought to Protect Religious Choice from Government Coercion, Not to Exclude Religious Expression from Civic Life.

The constitutional analysis of Respondent and his *amici* rests on a fundamentally confused interpretive methodology, particularly with respect to the use and significance of historical evidence of the Establishment Clause's intended meaning. In short, Respondent and his *amici* seek to dismiss altogether the direct evidence of what the Framers meant – the statements and conduct of the Framers themselves. Instead, they urge us to look to the history of certain public school controversies that occurred almost a century after the Establishment Clause was framed and adopted, and to what the states did in implementing their own disestablishment policies at the time of the Founding.

In his effort to draw this Court's attention away from the voluminous contemporaneous statements and practices of the Framers, Respondent first caricatures our reliance upon this direct and compelling evidence of the Framers' understanding of the Establishment Clause. According to Respondent, our historical analysis reduces to "anything the Founders did is OK." American Jewish Cong. Br. at 21.[10] We make no such claim. After all, as Respondent correctly suggests, Congress adopted the Sedition Act of 1798, when memories of the framing and ratification of the First Amendment were still fresh. But the Sedition Act provoked a "great controversy" and was "vigorously condemned as unconstitutional." *New*

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[10] Respondent's brief discusses historical evidence only briefly, Resp. Br. at 34-40, but "fully endorses" the "more extensive historical analysis" of *amici* American Jewish Congress, et al. *Id.* at 40 n.17. We will therefore attribute to Respondent all historical arguments made by those *amici*.

York Times Co. v. Sullivan, 376 U.S. 254, 273-74 (1964). Jefferson (who, along with Madison, led the attack) denounced the Act as "a nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image." *Id.* at 276.

In contrast, the historical examples of official religious activity described in our opening brief were uncontroversial, inspiring no constitutional crisis, no storm of protest, not even reported litigation. Thus while we grant that it is theoretically possible that the Framers of a constitutional provision could contemporaneously and openly engage in a wide range of practices that they understood to violate that provision, we find it highly unlikely, to say the least, that such dishonorable conduct could pass without exciting substantial public controversy and constitutional challenge.

Respondent, however, advances precisely the opposite proposition – that this Court should dismiss as irrelevant the Framers' contemporaneous religious statements and practices *because they were not controversial*. Resp. Br. at 37-38; American Jewish Cong. Br. at 20-25. According to Respondent, "[g]overnment prayer and religious proclamations" were not controversial in the Founders' time because "the nation was overwhelmingly Protestant, and no significant group of Protestants was victimized by these practices." American Jewish Cong. Br. at 25-26. *See* Resp. Br. at 37-38. This "unexamined Protestant consensus," broke down in the latter half of the nineteenth century, when Catholic complaints about Protestant instruction and Bible reading in the schools led to political turmoil.[11] Only then, says Respondent, did it become clear that government prayer and religious proclamations violate the Establishment Clause. From this premise,

[11] These practices apparently continued in one form or another until they were definitively declared unconstitutional in *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1967). As we noted in our opening brief, classroom prayer and Bible reading do implicate the principle of the Establishment Clause: the protection of individual religious choice from government coercion. Pet. Br. at 35-44.

Respondent invites this Court to adopt the following interpretive reasoning:

> "The [constitutional] principle was the same in both generations: government should not support or endorse religion . . . . The framers adopted the principle, and they applied it to all issues that were controversial among Protestants. They did not see its application to practices that substantially all Protestants could accept. But they put the principle in the Constitution, ready to be applied to new examples of the same evil."

Resp. Br. at 37-38. *See* American Jewish Cong. Br. at 29-32; Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 913-14 (1986).

Adoption of Respondent's interpretive theory requires acceptance of one of two conclusions, neither of which is tenable. Either the Founders *knowingly* engaged in unconstitutional practices – "[g]overnment prayer and religious proclamations" – because no one complained, or the practices that they engaged in were constitutional until someone complained. The first conclusion follows from Respondent's notions that the principle of the Establishment Clause was clear – no "endorsement" of religion – and that an "avowal of divine faith," such as prayer, is a clear "endorsement" of religion. Resp. Br. at 27; *see* American Jewish Cong. Br. at 51-52. It follows that the Founders frequent and official avowals of faith were intentional and knowing constitutional violations.[12] We submit that the more plausible reading of the history surrounding the framing of the First Amendment is

[12] Nor can the Founders' religious practices be viewed as some kind of ubiquitous constitutional mistake. The Founders and their intellectual forbears repeatedly explain their establishment philosophy in terms that indicate that they had given the proper relationship of government and religion much careful thought. *See* Pet. Br. at 14-18; Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 962-75 (1989) ("*Separation*").

that the Framers' religious statements and conduct as government officials were not controversial because they were viewed as clearly consistent with the principle embodied in the Establishment Clause.

The alternative conclusion that could flow from Respondent's argument – that official expressions of religious values were constitutional until they became controversial almost a century after ratification of the First Amendment – obviously represents a novel approach to constitutional adjudication. No one would dispute, certainly not Petitioners, that a constitutional safeguard applies to "new examples of the same evil." Resp. Br. at 38. As we put it in our opening brief, "the First Amendment prohibits modern methods of establishing a religion no less than it prohibits ancient ones." Pet. Br. at 31 n.32 (emphasis omitted). But governmental expressions of religious values are not new. And a practice that was so plainly understood by the Framers to be outside the Establishment Clause's prohibitions does not come within it, *ipso facto*, simply because the practice, in a different age, becomes "controversial."

In sum, we reiterate our opening brief's point that this case is governed by the *Marsh* Court's common sense observation that, "[i]n this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); Pet. Br. at 30. The only rational conclusion that can be drawn from the historical record is not that the religious statements and conduct of the Framers were constitutionally invalid because they were not controversial, but rather that they were not controversial because they were not constitutionally invalid.

The only historical evidence offered by Respondent that relates to the relevant time frame – the founding period – focuses exclusively on the legislative development of disestablishment within the states. The Establishment Clause, however, did not even apply to the states at that time; indeed, it had been specifically framed to ensure that Congress would

be disabled from interfering with state establishments. *See* note 22, *infra*. Quite apart from the doubtful relevance of the state practices cited by Respondent, *see Allegheny County*, 492 U.S. at 670 n.7 (Kennedy, J., concurring in the judgment in part, and dissenting in part) ("[T]he relevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause."),[13] the substance of those state practices has been seriously mischaracterized by Respondent.

For example, Respondent contends that the South Carolina Constitution of 1778 contained only "a bare endorsement" of the Christian Protestant religion as the established religion of the state, but that it was nevertheless found to be an unacceptable establishment of religion, despite the lack of

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[13] One of Respondent's *amici* offers a quotation from Jefferson which it contends supports the relevance of early state practice in construing the Establishment Clause. National PEARL Br. at 13 n.21. Examination of the full letter from which the quotation is drawn, however, shows the opposite to be the case. In this letter, Jefferson discusses the practice of the preceding Presidents in issuing Presidential Proclamations of Prayer, in explaining why he, virtually alone among the Presidents, refused to do so on Establishment Clause grounds, believing such proclamations to have a coercive effect. *See* Pet. Br. at 33-34. Jefferson believed he was so constrained not only because of the Establishment Clause, but also because of the Constitution's provision "which reserves to the states the powers not delegated to the U.S." T. Jefferson, Letter to Rev. Samuel Miller, in 5 *The Founders' Constitution* 98 (P. Kurland & R. Lerner eds. 1987) ("*The Founders' Constitution*"). He then goes on:

> I am aware that the practice of my predecessors may be quoted. But I have ever believed that the example of state executives led to the assumption of that authority by the general government, without due examination, which would have discovered that *what might be a right in a state government, was a violation of that right when assumed by another.*

Id. at 99 (emphasis added). Based on this evidence, at least, Jefferson clearly believed that the states may engage in practices that are not prohibited by the Establishment Clause, and, consequently, understood that such state practices are not evidence of what was prohibited by the Clause.

coercion, and was repealed in the Constitution of 1790. *See* Resp. Br. at 36; American Jewish Cong. Br. at 3, 14-16. Far from articulating "a bare endorsement of religion," the 1778 South Carolina Constitution mandated numerous coercive requirements.[14] Indeed, widely noted historian Anson Phelps Stokes concluded that the 1778 Constitution included "detailed provisions to insure a Protestant state probably . . . without parallel in our national history." 1 A. Stokes, *Church and State in the United States* 432 (1950) ("*Church and State*").

Respondent and his *amici* similarly claim that Virginia created "a bare endorsement" of the Episcopal Church, without any coercion, through the 1784 statute "for incorporating the Protestant Episcopal Church." They again argue that this "bare endorsement" without coercion was found to be an unacceptable establishment of religion and was subsequently repealed. *See* Resp. Br. at 36-37; American Jewish Cong. Br. at 3, 12-14, 16. But the incorporation statute nowhere stated that the Episcopal Church was to be the established, official church of the state. T. Buckley, *Church and State in Revolutionary Virginia 1776-1787* 106-07 (1977) ("*Revolutionary Virginia*"); *Church and State* at 384-87.Indeed, Respondent's *amici* admits that the "state's endorsement was implicit rather than explicit." American Jewish Cong. Br. at 13. Yet even the characterization of the Act as an "implicit endorsement" does not withstand scrutiny.

[14] Articles 3, 12, and 13 provided that only members of the Protestant religion could serve in state offices. Under Article 13, only persons who acknowledged a belief in God and in a future state of rewards and punishments could vote. These coercive features of the South Carolina Constitution of 1778 are pointed out by one of Respondent's other *amici*. *See* National PEARL Br. at 14. Article 38 of the 1778 Constitution stated that religious toleration would be granted only to persons and religious societies that acknowledge a belief in one God, and a future state of rewards and punishments, and that God is to be publicly worshipped. "Equal religious and civil privileges" were guaranteed only to "denominations of Christian Protestants." In order to "be, and be constituted a church," and become incorporated, a church organization had to subscribe to five designated articles of faith. In addition, no one was allowed to be a minister of a legally recognized church unless they subscribed to the five specified articles of faith, and several additional beliefs. *See* 6 F. Thorpe, *The Federal and State Constitutions* 3248-57 (1906) ("*Federal and State Constitutions*").

The Act transferred authority over the organization and operation of the church, which *had been* the established church, from the state to the church. To execute this *disestablishment*, the Act transferred the formerly state-owned property used by the church, including church buildings, surrounding land, and "glebes" farmed for the support of ministers, to church ownership. *Church and State* at 384-87; *Revolutionary Virginia* at 106-07. The statute incorporated the church, not to implicitly endorse it as the established church, but because the church now needed a legal form or entity distinct from that of the state to hold that property and to otherwise go about its affairs. James Madison himself, as a member of the Virginia Assembly, voted for the bill, explaining: "The necessity of some sort of incorporation for the purpose of holding and managing the property of the church could not well be denied, nor a more harmless modification of it now obtained." *Church and State* at 386. *See also Revolutionary Virginia* at 106-07. Indeed, the support of Madison and his allies in the Assembly created the majority in favor of the bill.[15]

[15] *Church and State* at 386. Moreover, the controversy regarding repeal of the Act arose out of the grant of the formerly state property to the church, not that the bill provided an "endorsement" of the Episcopal Church. *Revolutionary Virginia* at 65-72, 140, 167, 171. While the legislature had originally viewed the grant of state property in the incorporation act as clarifying the effective current property rights of the Episcopal Church, *id.* at 166-69, the repeal forces viewed the Act as effectively granting a large amount of state financial aid, raised by coercive general taxation, to the Church. The motivating concern behind the repeal movement was, therefore, a coercive practice that from the dissenters' perspective hardly amounted to a "bare endorsement." Indeed, because the 1787 repeal of the incorporation act left the property in

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Respondent argues that the Virginia general assessment bill proposed by Patrick Henry in 1785 did not involve coercion, but was nevertheless rejected as an establishment of religion. Resp. Br. at 35-36; American Jewish Cong. Br. at 16-17. The bill, however, clearly was coercive. Each taxpayer's funds were to be distributed to the Christian denomination designated by that taxpayer, or to a general state fund that would be used to support the local schools in each county. All schooling at the time was private and inextricably intertwined with religious values and teachings.[16] Thus, whether directed to a denomination of the taxpayer, or distributed to a school by a state fund, such assessments unavoidably compelled taxpayers to contribute to certain religious activities.[17]

Notably, parties on both sides of the assessment debate did not question the compulsion involved in an assessment. Proponents of assessments expressly acknowledged their coercive effects, arguing that since all received the civil benefits of a religious citizenry, all should be compelled to contribute to religion.[18] Madison, the leading opponent of the

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church hands, the controversy continued after repeal of the incorporation act, until 1802, when the legislature authorized the seizure and sale of all the property granted to the Episcopal Church in the 1784 act, except the church buildings and their immediate surrounding land. *Id.* at 170-72.

[16] *See, e.g.*, J. Whitehead, *The Rights of Religious Persons in Public Education* 41-42 (1991); R. Michaelsen, *Piety in the Public School* 80-81, 85 (1970); F. Eby and C. Arrowood, *The Development of Modern Education in Theory, Organization and Practice* 538-39, 548-49 (1934).

[17] The fact that ministers and church organizations led the fight for state-mandated assessments further indicates that the practical effect of an assessment was to compel contributions to denominations that might not have been made voluntarily.

[18] *See Church and State* at 388 (The first petition asking for the general assessment bill complained that without it the people were "left without the smallest coercion to contribute to" religion, and asked for an act "to compel every one to contribute something . . . to the support of religion."); *First Freedoms* at 138-140, 145.

Virginia assessment, opposed the bill precisely because of its coercive quality, as he eloquently set out in his historic *Memorial and Remonstrance*. Pet. Br. at 21-22.[19] While the assessment bill provoked debate over many issues, the permissibility of a "bare endorsement" of religion was not among them.[20]

The arguments of Respondent and his *amici* that purport to draw on history fail not only because they do not seriously challenge the conclusion that coercion of religious choice was the focus of the Framers,[21] but because they also do not

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[19] *See also* J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 136, 144-45, 147 (1990) (*"First Freedoms"*); *Church and State* at 389-391; *Revolutionary Virginia* at 138, 140, 149-51.

[20] Respondent and his *amici* attempt to use the Maryland assessment bill, also rejected in 1785, to the same effect. Resp. Br. at 35-36; American Jewish Cong. Br. at 17-19. This tax was again effectively coercive for those not exempt, for the same reasons as the Virginia bill. Moreover, the Maryland bill was not rejected because it was an establishment of religion, since Maryland maintained a religious establishment throughout this period. Christianity was declared the official state religion, public office was limited to Christians, and the constitutional protection for religious liberty was limited to "all persons professing the Christian religion." *First Freedoms* at 153-54, 157-58. The legislature also continued to exercise organizational control in minute detail over the Anglican church. *Id.* at 153-54. Indeed, for many years after the assessment bill was rejected, the state constitution retained a provision empowering the legislature to "lay a general and equal tax for the support of the Christian religion." *Id.* at 154, 157.

[21] Respondent's amici believes the coercion of religious choice could not be the vice at which the Establishment Clause is targeted because such a conclusion would leave no "independent meaning" to the Clause. American Jewish Cong. Br. at 9. Such an argument creates an artificial distinction, for both of the Religion Clauses seek to preserve religious choice from interference by government power, proceeding from a common fundamental philosophical premise that such interference is beyond the jurisdiction of civil government. *See* Pet. Br. at 14-18.

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establish that the secularizing results of their "no-endorsement" test could have been a serious goal of the Framers, and so be the animating principle of the Establishment Clause.[22] As demonstrated in our opening submission, the architects of our tradition of religious liberty premised their cause on explicitly religious philosophical principles, arguing that the reforms they sought were Divinely inspired. Pet. Br. at 14-22, 30-34. That they did

> without hesitation or embarrassment, underscores the pervasiveness of religious values and assumptions in the thinking of that time and hence the

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Applications of the Free Exercise and Establishment Clauses may overlap, but they are directed at different types of government action, the first a government prohibition of religious belief or practice, the second the exercise of government power in favo. of a religious belief. For example, an ordinance prohibiting all religions from owning property would be a burden on the free exercise of religion; a religiously-motivated statute bestowing direct financial aid only to religions would be an impermissible establishment of religion; and a regulation making members of only one religious denomination or sect eligible for a government benefit would be both. Moreover, even a neutral law prohibiting religious practice implicates free exercise rights, but raises no establishment concerns.

[22] Respondent tries to tease such an expansive, secular goal out of the Establishment Clause by arguing that the word "respecting" means the Clause was designed to address any action touching religion. *See* Resp. Br. at 39-40. But the word "respecting" was used in the Clause to prohibit the federal government from enacting laws "respecting" or "concerning" the many state establishments existing at the time, as well as to prohibit it from creating its own establishment. *See* R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 5, 9, 12-15, 49, 127 (1982); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 4, 9-15 (1978); Note, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. Rev. 645, 651-53; Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L.J. 65, 85, 89 (1962). Even the use of the word "touching," as proposed by Rep. Livermore, did not embrace a secularizing goal, but, consistent with Livermore's anti-Federalist views, was designed to bar federal power from affecting state establishments. *See id.*

> unlikelihood that citizens of that generation could have viewed a secular political culture purged of religious content as a live alternative.

Separation at 969.

In the historical circumstances of the Framers, the coercive power of the state was able to constrain religious liberty due to the institutional integration of church and state. "[G]overnments controlled or directly intervened in the internal affairs of churches, and churches claimed and were formally endowed with governmental powers."[23] By undoing this institutional integration, the Framers freed religious choice from the specter of government's coercive powers. Thus, faithful application of the Framers' disestablishment decision, and of the rule of law they intended to embody in the Establishment Clause, yields the conclusion that the First Amendment can be violated only by the governmental coercion of religious choice, whether directly or indirectly, but not by the expression of religious values in our civic life.

II. NO ONE'S RELIGIOUS BELIEFS WERE SUBJECTED TO GOVERNMENT COERCION DURING THE GRADUATION CEREMONY.

Respondent claims that we have employed a "limited definition of coercion," failing to appreciate "the subtle pressures . . . in the school setting." Resp. Br. at 10. Quite the contrary, in our opening brief, we recognized the importance of sensitivity to subtle forms of coercion. Pet. Br. at 36; *see also Allegheny County*, 492 U.S. at 659-60 (Kennedy, J., concurring in the judgment in part and dissenting in part)). In that brief, Pet. Br. at 39-44, we went on to point out that the *classroom* setting, due to compulsory attendance,[24] the role of the teacher

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[23] *Id.* at 963.

[24] Once it is determined that attendance at a public event is not compulsory, as was the case here, the coercion inquiry logically is at an end. *See* Pet. Br. at 39-41. Even if attendance is compulsory, the other features of the event, as in the graduation exercises here, may nevertheless lead to the conclusion that no coercion, even indirect, of religious choice is evident. *See* Pet. Br. at 41-44.

as an authority figure, and the fundamental pedagogical premise of the environment, may render young students "susceptible to unwilling religious indoctrination." *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in the judgment). *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements . . . . ").

While underscoring the supposed importance for Establishment Clause analysis of some generic "public school setting," Respondent seeks to depreciate the precise attributes of the actual setting of the graduation invocation and benediction here, Resp. Br. at 28-30, attributes which reveal these graduation exercises to be a "noncoercive setting" devoid of those elements of subtle coercion that have been of concern to this Court in the past.[25] As this Court put it recently, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved." *Board of Educ. v. Mergens*, 110 S. Ct. at 2372. Respondent simply overlooks the complete absence in the graduation setting of those facts that make the classroom so distinctive for Establishment Clause analysis. *See, e.g., Abington School Dist. v. Schempp, supra* (Bible readings part of prescribed curriculum; conducted under supervision of teachers; children may be excused during reading); *Engel v. Vitale, supra* (state-drafted school prayer).

The graduation ceremonies at issue here are not held during class; they are not necessarily even held at a public

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[25] The "heightened vigilance" in *all* this Court's cases applying the Establishment Clause in the public school context arises from coercive features, intrinsic to the *classroom*, such as mandatory attendance requirements and the like. Yet Respondent has embraced the very passages from *Wallace* and *Edwards* (quoted in text) that make this apparent, ignoring the obvious point of the Court's analysis. *See* Resp. Br. at 14-16. Indeed, where mandatory attendance requirements are not involved in a public school setting, this Court has found no Establishment Clause violation. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990).

school. J.A. 12-17. Students choose to be present; the ceremony is short, occurs only once in a student's career, and does not involve teaching; and virtually all of the students who choose to attend are in the company of their parents.[26]

Thus, the potentially coercive aspects of the classroom setting are not present at graduation exercises.[27] As for the importance of the occasion and the other attributes noted by Respondent, Resp. Br. at 28-30, they simply do not distinguish a public school graduation ceremony from many other civic ceremonies. If the desire of Respondent to attend his daughter's graduation requires the censorship of Rabbi Gutterman's prayers here, surely George Bush should have been barred at his inaugural from making a prayer his "first act as President."[28]

Respondent's complaint, after all, is that he "is opposed to and offended by the inclusion of prayer in the public school graduation ceremony." J.A. 5. He does not contend that he or his daughter were subjected to unwanted efforts at indoctrination in Judaism, that they were penalized for not subscribing

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[26] It is precisely these kinds of characteristics that have led lower courts to conclude that a graduation ceremony is quite different from "a classroom setting, where the prospect of subtle official and peer coercion warrants stricter separation of the state from things religious." *Jones v. Clear Creek Indep. School Dist.*, 930 F.2d 416, 422 (5th Cir. 1991). *See Albright v. Board of Educ.*, No. 90-C-639G, slip op. at 16 (D. Utah May 15, 1991) (secondary school graduation invocations and benedictions delivered in "voluntary and non-coercive circumstances"); Pet. Br. at 42 & n.4.

[27] Obviously aware of this distinction, Respondent is reduced to a transparent exaggeration to link graduation with normal classroom activities, arguing that "[p]romotional and graduation ceremonies are as integral to a child's school career as is daily class attendance." Resp. Br. at 16.

[28] George Bush, Inaugural Address, January 20 1989 in *Inaugural Addresses of the Presidents of the United States from George Washington, 1789 to George Bush, 1989* at 346 (Bicentennial ed. 1989).

to Rabbi Gutterman's expression of religious values, or even that they were subject to pressure, ostracism, or embarrassment as a result of their views of the rabbi's prayers. J.A. 2-7 (Complaint); J.A. 10-19, 24 (Agreed Statement of Facts). Nor do the facts here reveal the indirect coercion that can result from compelling a student to attend class and to opt out of a classroom religious activity. "No one was compelled to observe or participate in any religious ceremony or activity." *Allegheny County*, 492 U.S. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Respondent has simply been unable to point to any feature of the graduation invocation and benediction here that poses a "realistic risk" that these prayers "represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion." *Id.* Failing to employ governmental power to directly or indirectly coerce the religious choice of the graduating students, Rabbi Gutterman's invocation and benediction did not violate the Establishment Clause.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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